United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 23-168

UNITED STATES OF AMERICA,

Appellee

v.

CLARENCE JOHNSON,

Appellant

ON APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

John C. Reid
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

Counsel for Appellant
(Appointed by this Court)

C O N T E N T S

TABLE OF CITATIONS

*Cases or authorities chiefly relied upon are marked by asterisks

Statement of Issues Presented

1. Whether, on the indictment charging armed robbery, robbery and assault with a dangerous weapon, the evidence was sufficient as a matter of law to justify the denial by the trial judge of the motion for a judgment of acquittal made by the appellant at the close of the government's case.

2. Whether the case should be reversed and remanded for a new trial on all questions in view of the trial court's deliverance of the Allen charge.

The pending case has not previously been before this Court under the same or similar title.

Jurisdictional Statement

On January 22, 1969, the Grand Jury returned an indictment against appellant on seventeen (17) counts, charging in five (5) counts violation of D. C. Code §§22-2901 and 22-3202, that is, that on or about November 4, 1968, within the District of Columbia, appellant while armed with a dangerous weapon (a pistol), by force and violence and against resistance and by putting in fear, stole and took from the possession of five named individual employees of Safeway Stores, Incorporated, property of Safeway Stores, Incorporated consisting of approximately two thousand two hundred twenty-six dollars and twenty-two cents ($2,226.22) in money; and charging in five (5) counts violation of D. C. Code §§22-2901, that is, that on the same date, appellant committed the above described robberies without the use of a dangerous weapon; and charging in six (6) counts violation of D. C. Code §22-502, that is, on the same date appellant assaulted six named individual employees of Safeway Stores, Incorporated with a dangerous weapon (a pistol); and charging in one (1) count violation of D. C. Code §22-3204, that is, appellant on the same date did carry, openly and concealed on or about his person, a dangerous weapon, capable of being so concealed (a pistol) without a license therefore issued as provided by law.

Appellant was arraigned in the United States District Court for the District of Columbia on February 7, 1969 and

pleaded "Not Guilty." Trial, at which appellant was represented by appointed counsel, was held on April 14, 15, 1969, before Judge June L. Green and a jury. At the conclusion of the government's case, appellant's counsel moved for a judgment of acquittal, which was denied. The case was then submitted to the jury which found appellant guilty of five (5) counts of armed robbery, six (6) counts of assault with a dangerous weapon and one (1) count of carrying a dangerous weapon.

On May 16, 1969, appellant was sentenced to imprisonment for a period of five (5) to fifteen (15) years on each of five (5) counts of armed robbery, three (3) to ten (10) years on each of six (6) counts of assault with a dangerous weapon, and one (1) year on the count of carrying a dangerous weapon, to run concurrently.

On May 16, 1969, appellant filed a notice of appeal, and was permitted to proceed in forma pauperis by the District Court. By order dated June 19, 1969, this Court directed that the appeal be docketed and appointed present counsel to represent the appellant. The record in the case was docketed in this Court on July 1, 1969.

References to Rulings

The following ruling by the trial judge is pertinent to this case:

1. Denial of appellant's motion for verdict of acquittal at the end of the government's case. Tr. 58-59.

Statement of Facts

Upon the trial in the District Court, the following was produced:

1. John R. Nichols, Security Officer of Safeway Stores, Incorporated, testified that, according to an audit, $2,226.22 in money was taken from the Safeway Store at 6501 Georgia Avenue, Northwest, Washington, D. C. on November 4, 1968. Tr. 20-21.

2. Carlton Locus of 3139 Nineteenth Street, Northwest, Washington, D. C. testified that on November 4, 1968 he was an employee (a food clerk) for Safeway Stores located at 6501 Georgia Avenue, Northwest and that on such day at approximately 2:55 in the afternoon he was checking food and a man came up behind him, pointed a gun at him, and he was told by the man to empty the drawer into a bag. He testified that the man pulled him by the arm to the other end of the store where there were four men standing and that he thought they were all armed. Mr. Locus further testified that at no time did he see the appellant in or around the store and that he did not see any car parked outside the store. Tr. 21-24.

3. Carolyne Ware of 6000 Hawaii Avenue, Northeast, Washington, D.C. testified that on November 4, 1968 she was employed by Safeway Stores located at 6501 Georgia Avenue, Northwest and that on such day at approximately 2:55 in the afternoon, some guys came in the store, one of whom came up in her line, produced a gun and took money out of her cash register

after she had opened it. She testified that when he had done this, he moved to the next register attended by Doris Williams, who at first did not know what was happening and told him to "Get away from here." She testified that he said "Lady, I'm not playing with you. If you don't, I'll kill you. This is a holdup" and then opened up her register, took the money and moved down the line. Carolyne Ware further testified that she did not observe appellant either in the store or in a car outside the store. She testified that she saw three or four or five men walk out of the door of the store. Tr. 24-28.

4. Ernell Andrews of 6703 Silver Spring Road, Northwest, Washington, D. C. testified that on November 4, 1968 she was employed by Safeway Stores located at 6501 Georgia Avenue and that on that day at approximately 2:55 in the afternoon a man told her to "Open your drawer" and, her drawer being already open, he took everything in it. She testified that she did not see a weapon nor did she see what had happened to any of the other clerks at their checkout counters. She testified that the men were not masked, that she at no time observed appellant and that she not notice whether there was a car parked outside with a driver in it. Tr. 28-31.

5. Pauline Money of 4703 25th Street, Mount Rainier, Maryland testified that on November 4, 1968 she was in the employ of Safeway Stores at 6501 Georgia Avenue as a teller and that at approximately 2:55 in the afternoon two men each with

a gun followed a Mr. Bladen, assistant manager of the store, into the teller's cage and requested Mr. Bladen to open the safe which he did and asked Miss Money for the money she had in a drawer, and that they got just about everything in the office. Miss Money testified that she saw three men participating but that she at no time observed appellant. She testified she had a view of the outside of the store through a window but that she could not see the cars parked outside. Tr. 31-34.

6. Frederick A. Bladen of 5722 Seventh Street, North Arlington, Virginia testified that on November 4, 1968 he was employed by Safeway Stores at 6501 Georgia Avenue as Assistant Manager and that around 2:30 in the afternoon while taking care of inventory he noticed some youngsters around the front of the store and that when he went across the front of the store to go to his office, a little man ran up behind him, stuck a gun in his back and told him this was a holdup. Mr. Bladen testified that the man told him to go inside his office, get a paper bag and stuff money in it, which he did. He testified that the man told him to move faster and that in the meantime another man had tied Miss Money up with the drawer she had in front of her at the teller's desk. He further testified that when the men left the office they went to the left outside front door, went around the corner of the brick wall outside the building and that he peeped around the corner and saw them

running across the lot to Piney Branch Road. He testified that he told Mr. Gill Simmons, a stock clerk at this store, to follow him and said, "those boys were going to get in an automobile." Mr. Bladen testified that he and Mr. Simmons got in a Volkswagen, went out on Van Buren Street, headed east on Van Buren Street across Piney Branch Road, and just as they got to Piney Branch Road they saw five boys running to a white Corvair sedan approximately of the year 1960 or 1961 and that the five boys got in it at the corner of Eighth and Van Buren Street. Mr. Bladen testified that the car started taking off before the doors were shut and, because of that, there had to be a driver in the car at that time but that he couldn't tell whether anyone was in the car before the five boys got into it since he was directly behind and a city block away from the car. He testified that he did not see appellant in the store or in the car. He testified that the car was parked against the curb on the west side of Eighth Street at Eighth and Van Buren Street and that the car went down Van Buren Street and stopped at the Fifth Street stop sign. Mr. Bladen testified that he and Mr. Simmons were behind the Corvair and that, after crossing Fifth Street, he stopped and turned left on Sixth Street since he thought they were going to take a shot at him and Mr. Simmons said that he and Mr. Simmons went to Butternut and they turned east down Fourth Street where they stopped in front of Tony's Restaurant where there was a policeman to whom

they told what had happened and then went back to the store. He testified that later in the day he reported to CID East Headquarters where he saw a four-door Corvair sedan, with the same color and the same model which "looked like" the same car as they had been following and with a District tag on it. Tr. 36-42.

7. Gill Simmons of 6813 Riverdale Road, East Riverdale, Maryland testified that on November 4, 1968 he was employed by Safeway Stores at 6501 Georgia Avenue as grocery manager and that at approximately 2:55 in the afternoon he observed a robbery taking place in the store. He testified that a man at the front door by the office pointed a gun at him and told him to freeze and that another man came out of the office and together with two or three others ran out the front door across the Safeway parking lot, across Piney Branch and down Van Buren. Mr. Simmons testified that he and Mr. Bladen jumped into Mr. Bladen's car, went down Van Buren and by the time they got across Piney Branch the men were getting into a white 1960 Corvair with D. C. tags on it. He testified that the white Corvair went down Van Buren and that he and Mr. Bladen followed up to Fifth, that the Corvair stopped on the other side of Fifth and that since he and Mr. Bladen were getting too close, they turned left and headed up toward Butternut Street where a policeman was following them and they stopped and Mr. Simmons testified that he jumped out of the car and told the policeman what had taken

place. Mr. Simmons testified that he saw five men running in the Safeway lot and that he remembered one of the men who was tall, had bushy hair and had on a real loud color green pair of pants; he testified he saw this man in the store and running across the lot and jumping into the parked car. Mr. Simmons further testified that he did not see appellant at any time and that he could not observe whether anyone was in the car as he was a little less than a block behind the car. Tr. 42-46.

8. Officer Jack G. Klepfel of the Metropolitan Police Department testified that in the afternoon of November 4, 1968 while on duty with his partner, Officer Charles Kerick, monitored a radio complaint of a robbery of the Safeway Store at 6501 Georgia Avenue, Northwest in the District of Columbia and that earlier that afternoon he and his partner had "observed a vehicle of the same description on the Safeway lot at Seventeenth & Eye Streets, Northeast, and it was occupied by six subjects, and they appeared to be casing the Safeway Store at that location, and upon seeing us they took off at a high rate of speed." Officer Klepfel testified that he could not observe whether there were any groceries in the car and only that they were driving slowly across the driveway in front on the window of the Safeway. He testified that he saw appellant in the car behind the driving wheel and that upon observing the car for maybe half a minute the occupants saw him and his partner and then took off at a high rate of speed. He testified that he

and his partner followed the car for approximately three or four blocks before losing it in heavy traffic and that they managed to get the tag number of the car. He testified that he did not put in a call to Headquarters for assistance since they had no reason to stop them.

Officer Klepfel testified that as a result of getting the tag registration he subsequently learned the name and address of appellant and that after monitoring the broadcast of the robbery of the Safeway Store at 6501 Georgia Avenue, Northwest he and his partner proceeded to the location of appellant's home and parked their cruiser about half a block from there. He further testified that about 3:30 that day he and his partner observed appellant driving his auto north on the unit block of Fifteenth Street and then made a right hand turn on the fifteen hundred block of A Street, where he parked his car in front of 1523 A Street, at which time he and his partner alighted from their cruiser, approached appellant, and that Officer Kerick got up to the driver's side of the vehicle and hollered, "Watch it, he has a gun on the floor of the car." Officer Klepfel testified that he covered Officer Kerick while the latter got appellant out of the car and then he (Officer Klepfel) took appellant into custody, placed handcuffs on him and Officer Kerick removed a thirty caliber pistol from the floorboard, in front of the driver's seat. Officer Klepfel identified the weapon Officer Kerick took from the floorboard of appellant's

car, an envelope in which he placed ammunition that he recovered from appellant's left trouser pocket, including spent cartridge used by Sergeant Gibson of the Postal Range in test-firing the weapon and $292 in assorted bills and $3.00 in quarters which were removed from appellant's right front trouser pocket. Tr. 47-55.

9. Richard A. Hibey, Assistant United States Attorney read to the jury from a sealed certificate from the Metropolitan Police Department a certification that the records of the Metropolitan Police Department did not reflect that appellant on November 4, 1968 had a license to carry a pistol in the District of Columbia. Tr. 56-57.

10. The Trial Judge in her instructions to the jury delivered a modified Allen charge to the jury the last paragraph of which reads as follows:

> "Ladies and Gentlemen of the jury, in this case you must deliver a verdict of guilty or not guilty as to each count contained in the indictment." Tr. 90

After completing her instructions, the jury at approximately 3:35 P. M. retired to the jury room to commence deliberations, and at approximately 5:00 P. M. the jury having failed to reach a decision was excused for the night. The jury reconvened the next day, April 15, 1969 and, having received a letter from the jury stating that its members were unable to reach a verdict, the Trial Judge delivered a modified and more extensive form of the Allen charge at 10:10 A. M., a portion of which provided:

> "You may consider that the case must at some time be decided, that you were selected in the same manner and from the same source which any future jury must be, and there is no reason to suppose that the case will ever be submitted to twelve jurors more intelligent, more impartial, or more competent to decide, or that more or clearer evidence will be produced on the one side or the other." Tr. 98-100

The jury again retired at 10:25 A. M. and reconvened at 2:20 P. M., at which time it delivered its verdict of guilty on five (5) counts of armed robbery, six (6) counts of assault with a dangerous weapon, and one (1) count of carrying a concealed weapon. Tr. 90, 89-102.

Statutes and Rules Involved

District of Columbia Code

§22-2901: Robbery

> "Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, §810.)"

§22-3202: Committing Crime When Armed - Added Punishment

> "If any person shall commit a crime of violence in the District of Columbia when armed with or having readily available any pistol or other firearm, he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than five years; upon a second conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than ten years; upon a third conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for a term of not more than fifteen years; upon a fourth or subsequent conviction for a crime of violence so committed he may, in addition to the punishment provided for the crime, be punished by imprisonment for an additional period of not more than thirty years. (July 8, 1932, 47 Stat. 650, ch. 465, §2.)"

§22-502: Assault with Intent to Commit Mayhem or with Dangerous Weapon

"Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, §804.)"

§22-3204: Carrying Concealed Weapons

"No person shall within the District of Columbia carry either openly or concealed on or about his person except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years. (July 8, 1932, 47 Stat. 651, ch. 465, §4; Nov. 4, 1943, 57 Stat. 586, ch. 296; Aug. 4, 1947, 61 Stat. 743, Ch. 469; June 29, 1953, 67 Stat. 94, ch. 159, §204(c).)"

§22-105: Advising, Conniving, etc. at Criminal Offense

"In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be. (Mar. 3, 1901, 31 Stat. 1337, ch. 854, §908.)"

Federal Rules of Criminal Procedure

Rule 29: Motion for Acquittal

"(a) Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used

in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendant may offer evidence without having reserved the right.

"(b) Reservation of Decision on Motion. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal."

Rule 52: Harmless Error and Plain Error

"(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

"(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Argument

I. THE DISTRICT COURT ERRED IN FAILING TO GRANT APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE BECAUSE THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW THAT APPELLANT AIDED AND ABETTED IN THE COMMISSION OF ARMED ROBBERY, ROBBERY AND ASSAULT WITH A DANGEROUS WEAPON.

With respect to this point, the appellant desires the court to read the following pages of the reporter's transcript:

Tr. 20-57.

The conviction of appellant for armed robbery and assault with a dangerous weapon was based entirely on circumstantial evidence. Not one of the employees of the Safeway Store which was robbed was able to identify appellant either as taking part in the robbery or as a driver of a getaway car. The only evidence linking appellant with these crimes revolves around the fact of appellant's ownership of a white 1960 Corvair in which he was seen driving with five other men about an hour and one-half prior to the occurrence of the crimes by Officer Jack Klepfel of the Metropolitan Police Department. Tr. 47-55. Appellant's white 1960 Corvair was not identified, however, as being the getaway car observed by Messrs. Bladen and Simmons of Safeway Stores. Mr. Simmons testified only that the getaway car was a white 1960 Corvair with an unknown D. C. license number -- he did not identify appellant's car as the getaway car. Tr. 44-45. Mr. Bladen testified only that appellant's car "looked like the same automobile" used as the getaway car. Tr. 39-40. More importantly, both Mr. Bladen and Mr. Simmons testified that they could not see anyone, let alone the appellant, in the car in which the perpetrators of the crime escaped. Tr. 40-41, 45-46. Mr. Bladen testified that there had to be a driver in the Corvair because it started moving off before the robbers got the doors closed. Tr. 41. It is evident, however, that this was merely a conclusion reached by Mr. Bladen directly contradictory to his testimony that he could see no one in the

car before the robbers got in. Surely with five men getting into a car after running for some distance one of such men could easily have jumped into the driver's seat, started the car, and begun moving it before the last man got in. Thus, Officer Klepfel's observance of appellant driving his car about an hour and one-half prior to the occurrence of the crimes was not connected in the slightest way with the later observance by Messrs. Bladen and Simmons of a white 1960 or 1961 Corvair.

The fact that appellant had $292 in cash and some change in his pockets when arrested is immaterial to the case. This money was not identified as money taken from the Safeway Store at 6501 Georgia Avenue. Tr. 52, 55. Nor was any proof adduced to show that appellant's economic circumstances were such as to make it unlikely that he would have this amount of money in his possession. Likewise, the gun that was found on the floorboard of appellant's car was not identified as a gun that was used in the robbery at the Safeway Store and is therefore immaterial as far as the charges of armed robbery and assault with a dangerous weapon are concerned. Tr. 50-51.

It is obvious from the paucity of the evidence introduced by the government linking appellant to the robbery that appellant's motion for a judgment of acquittal made at the end of the government's case should have been granted. Rule 29(a) Federal Rules of Criminal Procedure, 18 USCA. The court in Curley v. U. S., 160 F.2d 229, 81 U.S. App. D.C. 389, cert. den. 331 U.S. 837 (1947),

said that the critical point in determining whether or not a trial judge should let a case go to the jury is the existence or nonexistence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must have such a doubt, the judge must require acquittal. On the other hand, if reasonable jurymen might fairly have reasonable doubt or might fairly not have reasonable doubt, the case is for the jury to decide. The court summarized the rule thusly:

> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts. The task of the judge in such case is not easy, for the rule of reason is frequently difficult to apply, but we know of no way to avoid that difficulty." 160 F.2d at 228, 229.

A review of the case authorities strongly suggests that a judgment of acquittal, at least on the charges of armed robbery, robbery and assault with a dangerous weapon, should have been granted. In Cooper v. U. S., 218 F.2d 39, 94 US APP. DC 343 (1954), the tag number of the car in which robbers fled was identified,

as was one robber in the car by the name of Bullard. The car was registered in Bullard's name but it was agreed by all witnesses that Cooper was actually purchasing the car. Cooper drove the car upon occasion and his fingerprints were found on the car. There was also other incriminating evidence that he participated in the robbery. Nevertheless, the court concluded that upon the evidence in the case against Cooper, a reasonable mind must necessarily have had a reasonable doubt as to Cooper's guilt. The court felt that the facts were sufficient to create suspicion that Cooper was guilty, but that, since guilt must be established beyond a reasonable doubt, the judge could not let the jury act on what would necessarily be only surmise and conjecture. In Scott v. U. S., 232 F.2d 326, 98 US App. DC 105 (1956), Scott was convicted of aiding and abetting one Pell in a robbery under D.C. Code section 22-105. The evidence against Scott was that (1) he was seen across the street from the liquor store with Pell about five minutes before the holdup; (2) when Pell was arrested his wallet contained a piece of paper upon which appeared Scott's address with the notation "Enter through the rear"; (3) when the police entered Scott's apartment Scott denied that he had known a Mr. Pell and also said that he "had been home all day" (both of these contentions were later disproved); (4) on the top of a dresser in Scott's apartment the police found a pair of gun grips which "matched pretty good" Pell's gun. The court

stated that such evidence was sufficient to create "grave suspicion that Scott advised, incited or connived at the offense or aided and abetted Pell." 232 F.2d at 364. Nevertheless, the court felt that grave suspicion was not enough to convict Scott and it therefore held that the District Court should have granted Scott's motion for judgment of acquittal.

The case of Goodwin v. U. S., 347 F.2d 793, 121 US App DC 9, cert. den. 382 U.S. 855 (1965), is closely analogous to the one at issue here. In Goodwin three men robbed a grocery in northeast Washington at gunpoint shortly before 8:00 P.M. At approximately 8:00 P.M. about a block and one-half from the grocery, an off-duty policeman noticed an automobile occupied by four men traveling at a high rate of speed away from the vicinity of the robbery. The car had a D.C. tag No. RT-324. One hour later in another section of the city a policeman in a scout car saw an automobile occupied by four men being operated at a high rate of speed, bearing D.C. tag No. RT-324. The officer followed and stopped the car. The officer noticed a pistol in the car, arrested the occupants and upon searching the car found the property stolen from the grocery. The four occupants, including appellant Vaughn, were convicted of housebreaking and robbery. Three of the occupants were positively identified as the three men who robbed the grocery; the fourth occupant, appellant Vaughn, was not shown to have been in the grocery during the robbery or in the automobile at the time it

apparently was awaiting the three active robbers, although the officer who saw the car speeding away within minutes after the crime said it contained four (albeit unidentified) males. Appellant Vaughn denied at the trial any participation in the crime. The trial judge, however, submitted the case to the jury on the ground that, being in the car when the officer stopped it, Vaughn was in possession of the recently stolen property found therein. In reversing Vaughn's conviction the court held that his occupancy of the car (in which stolen goods were found) in another part of the city an hour after the crime, in view of his denial of guilt, was not enough to justify the conclusion beyond a reasonable doubt that he had been a look-out man. (Chief Judge Bazelon thought that it was not relevant that Vaughn testified in his own behalf, since no inference could be drawn from a failure to testify. See Griffin v. California, 380 U.S. 609 (1965).) See also Campbell v. U. S., 316 F.2d 601, 115 US App. DC 30 (1963); Borum v. U. S., 380 F.2d 565, 187 US App. DC 48 (1967).

In the present case, what was the evidence, either direct or circumstantial, that appellant drove a getaway car? Neither of the two men who testified they saw the getaway car was able to say whether appellant was in the car. Tr. 40-41, 45-46. No one testified that appellant was seen in the Safeway Store or in a car outside or anywhere near the vicinity of the crimes. The closest that appellant's car came to being identified as

the getaway car was Mr. Bladen's statement upon viewing appellant's car at police headquarters that appellant's car "looked like" the getaway car. Tr. 40. It may be suggested here that there probably are numerous 1960 or 1961 white Corvairs in the District of Columbia metropolitan area which match the description of appellant's car and thus Mr. Bladen's testimony that he saw what "looked like" appellant's car was mere conjecture on his part. Further, no one testified as to the number of occupants of the getaway car, that is, whether there were any more men in the car than had actually participated in the robbery. Thus, since there was no evidence, either direct or circumstantial, that appellant participated in the holdup of the Safeway Store, it was mandatory under the above-cited authorities for the trial judge to direct a judgment of acquittal. Borum v. U.S., supra. Surely the evidence against appellant was even less persuasive than in Cooper v. U.S., supra, or Scott v. U.S., supra. Finally, the testimony of Officer Klepfel that he saw appellant driving a white 1960 Corvair an hour and one-half prior to the occurrence of the crimes at issue in a different part of the city must, as in Goodwin v. U. S., supra, be disregarded as having no bearing or connection with the holdup of the Safeway Store.

Accordingly, the motion for judgment of acquittal at the end of the government's case should have been granted. In view

of the lack of evidence that appellant aided and abetted the commission of the crimes charged, a conclusion of guilt could be reached only by impermissible speculation. This, of course, is contrary to law. See Kemp v. U.S., 311 F.2d 774, 114 US App. DC 88 (1962).

II. EVEN IF IT IS HELD THAT THE JUDGMENT OF ACQUITTAL WAS PROPERLY DENIED BY THE TRIAL JUDGE, THE CASE SHOULD BE REMANDED FOR A NEW TRIAL ON ALL QUESTIONS BECAUSE OF THE DELIVERANCE OF THE ALLEN CHARGE.

With respect to this point, appellant desires the court to read the following pages of the reporter's transcript: Tr. 90-91, 98-100.

A. The Allen charge is per se coercive and its use resulted in the denial of due process to the appellant.

The time has now come for this court to abolish the use of the Allen charge as its use violates due process. Any jury-control device (such as the Allen charge) which creates so strong a potential for coercion constitutes a violation of due process, and when the coercive impact of that device cannot be assessed with any accuracy pragmatic concern for the preservation of constitutional rights requires that the use of the device be proscribed. Note, Due Process, Judicial Economy and the Hung Jury - A Re-examination of the Allen Charge, 53 Va. L. Rev. 123 (1967).

Judge Burger in Fulwood v. U.S., 369 F.2d 960, 125 US App. DC 183, cert. den. 387 U.S. 934 (1966) in upholding the validity

of the Allen charge, said that the court had not been presented with any arguments that would lead it to change its views. Subsequent to the Fulwood decision, the Virginia Law Review published the article previously cited which presents a persuasive case that the Allen charge is unconsitutional. The article points out, first of all, that the Allen charge is unbalanced against the minority since the majority are not usually urged to reconsider its position. Thus, there is a strong implication, supported by the powerful position of the trial judge giving the charge, that the majority is correct and that the minority should yield its position and conform to the majority. 53 Va. L. Rev. 123, 143.

Secondly, the potentially coercive effect of an Allen-type instruction is such that it seems to violate the standards laid down by the Supreme Court in Sheppard v. Maxwell, 384 U.S. 333 (1966); Turner v. Louisiana, 379 U.S. 466 (1965); and Jackson v. Denno, 378 U.S. 368 (1964). In Sheppard the court found that pretrial publicity had such a potential for coercive effect on the jury that a reversal was required. In Turner the court reversed a criminal conviction when the two principal witnesses for the prosecution had mingled freely with the sequestered jurors during the period of the trial. The court quoted with approval Mr. Justice Holmes' statement that "Any judge who has sat with juries knows that in spite of forms,

they are extremely likely to be impregnated by the environing atmosphere." 379 U.S. at 472. In Jackson the court found a denial of due process in the New York State courts' practice of submitting to the jury simultaneously the questions of the voluntariness of a confession and the guilt of the confessor, with an instruction that if it found the confession involuntary it was to ignore it in deciding the question of guilt. The impact of these decisions is summarized succinctly:

> "[T]he potential coercive impact of an Allen-type instruction is such that it seems to violate the standards laid down in Sheppard, Turner and Jackson, even if the language of the instruction is tightly drawn with a view to achieving 'balance.' For the thrust of the charge is not captured by its specific language, but rather in its appeal to minority jurors to relinquish positions which they have reached presumably as the result of conscientious reflection and consultation. Given the state of the trial at which the charge is delivered, the recognition that 'in spite of forms ...[juries] are extremely likely to be impregnated by the environing atmosphere' [Frank v. Mangum, 237 U.S. 309, 349 (1915) (Holmes, J., dissenting)], the inherent respect which the courts commands among the jurors, and the impossibility of ascertaining the extent to which the verdict has been influenced by factors admittedly irrelevant to the question of guilt, it seems difficult to conclude that the Allen charge affords a defendant an impartial jury and a verdict 'induced only by evidence and argument in open court.'" 53 Va. L. Rev. at 142, 143.

The article goes on to discuss the effect hung juries have on the judicial system and finds that approximately six-tenths of one percent of all felony prosecutions end in hung juries. 53 Va. L. Rev. at 145. Thus, in view of the small

percentage of cases that end in hung juries, the saving in court time which would be necessary for a new trial does not seem worth the risk of serious prejudice to the defendant inherent in virtually any attempt by the court to force a divided jury to agree unanimously on the question of guilt. In concluding, the article states:

> "...At any rate, one thing seems clear. The Allen-type instruction is an unconstitutional device which runs a substantial risk of undermining the entire philosophy of our criminal system in the name of what is at best a tiny saving in judicial time." 53 Va. L. Rev. at 149.

Accordingly, the Allen charge given by the trial judge resulted in depriving appellant of due process and therefore this case should be reversed and remanded for a new trial.

B. The Modified Allen Charges Given by the Trial Judge Were, Given the Facts of the Case, Coercive on the Jury.

In her instructions to the jury, the trial judge, in the course of delivering her version of the Allen charge, stated:

> "Ladies and gentlemen of the jury, in this case you must deliver a verdict of guilty or not guilty as to each count contained in the indictment." Tr. 90.

The jury retired to deliberate at approximately 3:35 P.M. on April 14, 1969 and at approximately 5:00 P.M. the jury was excused for the night, with instructions to begin deliberation again at 9:30 the next morning. Tr. 94-95. At about 10:10 A.M. on April 15, 1969 the jury sent a letter to the judge saying they were unable to reach a verdict. Thus, the jury had been

deliberating a little more than a half hour on April 15th and one hour and one-half on April 14th. The trial judge then proceeded to deliver a lengthy version of the Allen charge, which contained the following phrase not sanctioned by Allen v. U.S., 164 U.S. 492 (1896), to wit:

> "You may consider that the case must at some time be decided ...." Tr. 98.

In view of the very tenuous evidence that appellant had any connection with the crimes charged, the charges delivered by the trial judge were improper. In Cooper v. U.S., 357 F.2d 274, 276, 123 US App. DC 83 (1966), Chief Judge Bazelon in his concurring opinion cited with approval a statement contained in U.S. v. Garguilo, 310 F.2d 249, 259 (2d Cir. 1962) to the effect that "the closeness of the issue ... imposed an obligation on the trial judge to instruct the jury with extreme precision, as he realized, and on us to review the charge with what, in a less doubtful case, would be undue meticulousness." Such a rule is particularly apposite here. See Peterson v. U.S., 213 Fed. 920, 924 (9th Cir. 1914). The trial judge's admonition to the jury in two instances that the jury must decide the case was an unauthorized extension of the Allen charge and was calculated to have a coercive effect on the jury. It prejudiced the right of appellant to a hung jury and a mistrial. Green v. U.S., 309 F.2d 852 (5th Cir. 1962); U.S. v. Harris, 391 F.2d 348 (6th Cir. 1968). As the court stated in Harris, supra, "it is conceivable

that in a given case it might never be possible to obtain a unanimous verdict of either acquittal or guilt." 391 F.2d at 355. The Harris case is close in point since there the court held that the statement "this lawsuit must be decided -- it must be decided at some time by some jury" was coercive.

This court recently upheld the use of a modified version of the Allen charge in Fulwood v. U. S., supra. In that case the statement "some jury some time will have the duty to decide this case, and I hope that you, as the jury in this case, will be able to decide the matter," 369 F.2d at 963 (emphasis by the court) was held not to be coercive. As pointed out by the court in Fulwood, however, the trial judge expressed a hope that the jury would decide the case. (The court noted that its considerable work would be eliminated if District Judges would consistently use a form of instructions plainly within Allen and cited Junior Bar Section of D.C. Bar Ass'n, Criminal Jury Instructions §41 (1966). This form was not used at appellant's trial.) In the case at bar, the trial judge did not express a mere hope that the jury would decide the case; on the contrary, the jury was told that they "must deliver a verdict of guilty or not guilty as to each count contained in the indictment." Tr. 90. Further, the trial court's statement that "the case must at some time be decided" was not followed by any language of hope similar to that in Fulwood. Tr. 98.

Rather than being covered by Fulwood, supra, the charges to the jury come closer to those rejected by the Supreme Court in Jenkins v. U.S., 380 U.S. 445 (1965) where the trial court told the jury "you have got to reach a decision in this case." The Jenkins decision indicates, as the court in U.S. v. Harris, supra, stated, that "The Supreme Court takes a dim view of any extension of the Allen charge which might be considered coercive." 391 F.2d at 357. It may be suggested that the views of Judge Brown, dissenting in Huffman v. U.S., 297 F.2d 754, 759 (5th Cir. 1962) and those of the Arizona Supreme Court in State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959) that the Allen charge should be outlawed represent more closely the views of the Supreme Court and that the Allen charge has outlived its usefulness.

Accordingly, in view of the coercive effect of the modified Allen charges given by the trial judge to the jury, there was plain error under Rule 52(b) of the F.R.C.P. and thus the case should be reversed and remanded for a new trial if appellant's motion for a judgment of acquittal is not to be granted on all counts.

Conclusion

Appellant's conviction must be reversed on the ground that the motion for judgment of acquittal should have been granted; if and to the extent appellant's conviction is not

reversed on such ground, appellant's conviction should be reversed and remanded for a new trial on the ground that the Allen charge deprived appellant of due process or that the modified Allen charges were coercive.

Respectfully submitted,

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Counsel for Appellant
(Appointed by this Court)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA CIRCUIT

No. 23-168

UNITED STATES OF AMERICA,

Appellee

v.

CLARENCE JOHNSON,

Appellant

ON APPEAL FROM THE UNITED STATES

DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

John C. Reid
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Counsel for Appellant
(Appointed by this Court)

C O N T E N T S

TABLE OF CITATIONS

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE BEFORE THE JURY FOR IT TO CONCLUDE BEYOND A REASONABLE DOUBT THAT APPELLANT WAS GUILTY OF THE CRIMES CHARGED. THE COURT SHOULD HAVE GRANTED APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE GOVERNMENT'S CASE.

(Tr 20 - 57)

The government contends that the evidence adduced at trial created a prima facie case of appellant's guilt and that, since its case went unrebutted, appellant's conviction should be affirmed. Apart from the unwarranted and unprecedented conclusion which the government obtains from the fact that appellant did not offer evidence in his behalf, it is clear that the government did not present a prima facie case.

The government contends that three "scenes" compel the conclusion that the evidence presented at trial could fairly have indicated beyond a reasonable doubt that appellant was the driver of the get-away vehicle. First, the government contends that appellant was seen in the company of five others in a white Corvair "casing" another Safeway store earlier. Aside from the irrelevancy of this supposed piece of evidence, the government has unwarrantably twisted the evidence adduced at trial. Appellant was not seen "casing" another Safeway store earlier. To the contrary, Officer Klepfel testified only that appellant and five others "appeared to be casing the other Safeway store". (Tr 49) No testimony was offered stating that appellant was seen "casing" the other Safeway,

merely that he appeared to be casing it. Appellant could just as easily have been looking for someone in the store or pulling out of the store after a shopping trip. The evidence did not exclude either of these hypotheses. Furthermore, the use of the word "casing" was merely a conclusion, unsupported at that; this word is no doubt a term of art in police jargon and should not be thrown about as carelessly as was done at the trial.

Second, the government contends that six people with guns robbed the cash registers of the Safeway store on Georgia Avenue using a white Corvair as the get-away car. This contention is not only completely unsupported by, but is contradicted by, the evidence. None of the witnesses to the crimes testified that they saw six men rob the Safeway store. Furthermore, only five men were seen getting into the alleged get-away car and no one said they saw anyone, let alone appellant, in the get-away car. Appellant was not identified by any of the many witnesses to the crimes as having participated in the crimes.

Third, the government contends that, when appellant was arrested he was still driving the white Corvair, had a gun, and had two hundred and ninety-four dollars, all in bills, except for 12 quarters -- which could easily have been the proceeds of a cash register. Surely this contention goes beyond mere puffing of the actual facts as presented at the trial and approaches the bounds of imprudent speculation. First of all, the government's reference to the white Corvair is very misleading.

No evidence was presented that the Corvair appellant was arrested in was the same Corvair as was used in the get-away from the robbed Safeway store except that of Mr. Bladen who testified that the car he had been following "looked like" appellant's car. (Tr 40) Secondly, the gun found in appellant's car was in no way connected with the crimes by the testimony. Finally, the government's contention that the 12 quarters found on appellant could easily have been the proceeds of a cash register is entirely unsupported by the record. No evidence was presented that change was taken from the Safeway store. (If change was taken, why did not appellant also have any dimes or nickels?) More importantly, no evidence was adduced linking the money found on appellant to the money taken from the Safeway store. Thus, the fact that appellant had 12 quarters, without more, is of little or no meaning as evidence against appellant. Cf. Hunt v. United States, 115 U.S. App. D.C. 1, 316 F.2d 652 (1963).

The government cites Bailey v. United States, 128 U.S. App. D.C. 354, 389 F.2d 305 (1967) as limiting the precedent value of Goodwin v. United States, 121 U.S. App. D.C. 9, 347 F.2d 793 (1965) on which appellant relies. The two facts which the Court used in Bailey to distinguish Goodwin are not present here. In Bailey three out of four suspects of a robbery were identified as participants in the crime. The implication was strong that the fourth suspect, being unidentified, was the

driver of the get-away car. Here, appellant was the only one arrested for the crimes alleged and was not identified by anyone. Secondly, the money on each of the four suspects, when added together, equalled more or less the stolen money. The only reason why in Bailey the money found on the suspects was identifiable as being the fruits of the crime was the fact that a brown leather wallet of the victim was found in the car. Here, no evidence connected the money appellant had in his possession with the money taken from the Safeway store.

It seems obvious that, even when taken together, the government's case did not result in the production of sufficient evidence to permit the jury to decide whether appellant was guilty beyond a reasonable doubt. Therefore, the trial judge should have granted appellant's motion for a judgment of acquittal.

II. THE ALLEN CHARGE IS PER SE ERRONEOUS AND IT WAS ERRONEOUSLY GIVEN IN THE CONTEXT OF THE CASE

A. The Allen charge is per se erroneous and unconstitutional.

Since the Allen charge is per se unconstitutional, the Court must under Rule 52 (b) notice the clear error of the trial judge in delivering the charge.

The government contends that the Allen charge represents a fair accommodation between society's and the accused's common interest in avoiding so far as possible a hung jury. Getting into the realm of psychology, the government bases its support of the Allen charge on "human nature" and the contention that there is the danger that once a juror expresses his opinion in

the jury room he may find it psychologically difficult, due to pride or obstinancy, to withdraw from that position even though throughout the discussion he might honestly come to believe that his originally expressed view is incorrect.

The balancing of society's and the accused's common interest, it is submitted, is inapposite in this situation and, in any event, is less than persuasive. The United States Constitution guarantees to an accused criminal the right to a fair trial by jury. Nowhere does the Constitution require or even permit the courts to balance a defendant's right to a fair jury trial with the cost and trouble to society in providing such jury trial. The interest of a defendant to a fair jury trial is foremost; thus, if the Allen charge results in prejudicing an accused's right to a fair jury trial, as it does, its use must be prohibited as being unconstitutional.

The government's reliance on the psychological rigidities and vicissitudes of human nature to support the Allen charge brings to the forefront and exposes the coercive nature of the Allen charge. Initially it should be stressed that the Allen charge is unbalanced against the minority since the majority are not usually urged to reconsider their position. Judge Wisdom's comment in Green v. United States, 309 F.2d 852, 855 (5th Cir. 1962) is pertinent:

> [T]here is no legal rule that the majority of jurors have better judgment than the minority. There is no legal rule that the minority, merely because they are in the minority, should distrust their own judgment.

> Such an instruction leads a jury to believe that it is the duty of the dissenting jurors to accede to the majority's views without full discussion and without regard to the historical right of a single juror to stick to his conscientious opinions of the case.

Paraphrasing the government's contention regarding "human nature", there is the danger that once the trial judge urges the minority to re-examine its position, a dissenting juror may find it psychologically difficult, due to the powerful position of the trial judge, to maintain his conscientious and honestly held views. In view of the fact that "a mistrial from a hung jury is a safeguard to liberty", (Green v. United States, supra, at footnote 3), and because of the potentially coercive impact of the Allen charge, it is difficult to justify the continued use of the Allen charge.

B. The Allen charge, given the context of the case, was coercive.

Notwithstanding the government's contention, the Allen charges given by the trial judge were clearly coercive. Appellant's views presented in his brief amply demonstrate this. If additional evidence is needed, however, appellant would point out that, even though he was convicted on all counts of armed robbery, one of the victims testified that she did not see a weapon. (Tr 28-31) The lesson from this is clear. The jury was so intimidated by the trial judge's charges that its members were forced to give up any conscientiously held beliefs as to appellant's innocence.

CONCLUSION

Wherefore, it is respectfully requested that appellant's conviction be reversed.

John C. Reid

1700 Pennsylvania Ave., N. W.
Washington, D. C. 20006

Counsel for Appellant
(Appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief has been mailed, postage prepaid, to appellee's attorney, Robert C. Crimmins, Esq., Assistant United States Attorney, Third and Constitutions Avenue, N. W., Washington, D. C. 20001, this 31st day of October, 1969.

John C. Reid

IN THE UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA

THE UNITED STATES OF AMERICA,	)	No. 23,168
Appellee,	)	
v.	)	(Cr. 105-69)
CLARENCE JOHNSON,	)	
Appellant.	)	

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Appellant, by his court appointed attorney, John C. Reid, respectfully petitions this Court to set aside the opinion and judgment rendered herein on the 19th day of June, 1970 and to grant appellant a rehearing of this appeal, or, in the alternative, to transfer this cause to the Court en banc, for the reasons set forth below. In accordance with Rule 14 of the Rules of the United States Court of Appeals for the District of Columbia and pursuant to Rule 35(b), Federal Rules of Appellate Procedure, the Appellant asks that this Petition be taken as both a petition for rehearing and a suggestion for a hearing by the Court en banc.

The Appellant respectfully sets forth the following reasons why a rehearing of this cause should be granted and why this cause should be heard by this Court en banc:

(1) THE DECISION OF THE MAJORITY DEPARTS FROM THE REASONABLE DOUBT STANDARD FOR CRIMINAL CONVICTIONS AND THEREBY RAISES QUESTIONS OF EXCEPTIONAL IMPORTANCE AND PUTS ITSELF IN CONFLICT WITH LONG-STANDING DECISIONS OF THIS COURT AND OF THE SUPREME COURT OF THE UNITED STATES.

As forcefully stated by Judge Robb in his dissenting opinion, the majority has "lowered the traditional safeguard of proof beyond a reasonable doubt" by affirming a conviction which rests at best on an "aura of probability" and the "instinct" of the jury.

Where one of the three judges vigorously argues that insufficient evidence has been presented to allow the jury verdict to stand and where the majority opinion apparently concurs in the conclusion that the verdict could not stand under the traditional reasonable doubt standard, it is imperative that a decision of such significance be reviewed by the full Court sitting en banc. Allowing this decision to stand will in effect be a relinquishment of any appellate review of jury verdicts, since it is close to inconceivable, absent clear prejudice or other such bias, that a jury could convict on less evidence than has been presented in this case.

The evidence in the case has been thoroughly reviewed by Judge Robb in his dissenting opinion. After this review, he states: "In my judgment this evidence, although it may have generated a suspicion that appellant had participated in the robbery, fell far short of the proof that would justify a jury in finding guilt beyond a reasonable doubt." The evidence presented was circumstantial, and most of it, if properly objected to below, would have been excluded as irrelevant or as mere hearsay. The crucial fact, that there was <u>any</u> driver of the getaway car, was not proved at all, and even the majority admits that at best, the evidence only "rationally indicat[ed] that there was a driver waiting in the car." A rational hypothesis without more is mere speculation and does not provide grounds for a jury to find guilt beyond a reasonable doubt.

Judge Robb points out in his dissenting opinion that the majority seems to admit being swayed in its conclusion by the great rise in "hit-&-run crime made possible by the combination of disoriented youths, easy access to guns, and the seeming unrestricted availability of credit to buy automobiles." (Majority Opinion, page 5.) This suggestion that the Court's supervision of jury verdicts be reduced in response to the rising crime wave in the District of Columbia must be stoutly resisted by this Court.

Few could doubt that juries in the District are influenced in their judgments by the crime epidemic, but it is just in such times of mass hysteria that the traditional protection of the reasonable doubt standard, carefully policed by the district judges and the Court of Appeals, becomes of paramount importance.

A review of the majority opinion by the Court en banc will show that their decision can only be sustained by a marked departure from the standard set forth by the Supreme Court that "the verdict in a criminal case is sustained only when there is relevant evidence from which the jury could properly find or infer, beyond a reasonable doubt, that the accused is guilty." American Tobacco Company v. United States, 328 U.S. 781, 787 n.4, 66 S. Ct. 1125, 1128, 90 L.ed. 1575 (1946). The decision of the majority likewise departs from the leading case in this circuit. Curley v. United States, 81 U.S.App.D.C. 389, 160 F.2d 229, Cert. Den., 331 U.S. 837 (1947). This Court, in Curley, stated that "the judge cannot let a case go to the jury unless there is evidence of some fact which to a reasonable mind fairly excludes the hypothesis of innocence." The majority does not pretend that the hypothesis of innocence is fairly excluded, but only that there is an "aura of probability" which to their mind would justify committing

the matter to the "instinct" of the jury. See also Cooper v. United States, 94 U.S. App. D.C. 343, 218 F.2d 39 (1954); Crawford v. United States, 126 App. D.C. 156, 375 F.2d 332 (1967).

Moreover, the majority appears to consider that the standard to be applied by the trial judge in acting on a motion of acquittal and that to be applied by this Court on appeal differ, which is in conflict with the cases cited above. See also United States v. Nelson, 419 F.2d 1237, 1241 (1969). The majority stated: "We cannot say here that the spectre of injustice was so perilously present as to make the judge's choice to abide by the jury's decision an unacceptable one." The role of this Court is not to meditate over whether the trial judge's decision is "acceptable" according to some innate sense of fair play but is rather to review again the evidence presented to see whether a reasonable jury could conclude beyond a reasonable doubt that the defendant was guilty. The novel approach of the majority is without support in law or tradition and must be rejected by this Court.

(2) IT IS MOST APPROPRIATE THAT THE COURT EN BANC HEAR ARGUMENT BY APPELLANT ON THE USE BELOW OF THE ALLEN CHARGE, SINCE THE MAJORITY HAS DECLINED TO REMEDY THE DEPRIVATION OF APPELLANT'S RIGHT TO AN UNCOERCED JURY VERDICT IN DEFERENCE TO THE TRADITION THAT THIS MATTER SHOULD BE DETERMINED BY THE FULL COURT.

The majority opinion, while refusing to reverse Appellant's conviction on the basis of the use of the so-called Allen charge, suggested that this cause might appropriately be heard en banc, at which time the full Court could determine whether the admittedly coercive element of the Allen charge acted in this cause to deprive Appellant of his constitutional rights under the fifth and sixth amendments. The majority opinion reviewed the avalanche of litigation which use of the Allen charge has brought about in the several circuits. It concluded that adoption of the charge developed by the ABA Project might suitably be done by the Court en banc and that such a step might be a wise exercise of the Court's supervisory jurisdiction. The majority also distinguished the facts of this case from Fulwood v. United States, 125 U.S. App. D.C. 183, 369 F.2d 960 (1966), the leading case on this subject in this circuit. The majority indicated that the risk of coercion under the very close fact situation of this case increased the dangers of the Allen charge, and that granting a new trial here would be consistent with prior decisions of this Court.

(3) A REHEARING OF THIS CAUSE SHOULD BE GRANTED ON THE GROUNDS THAT THE MAJORITY MISSTATED SEVERAL MATERIAL FACTS IN ITS OPINION. THESE MISSTATEMENTS, AS SET FORTH BELOW, WERE DETERMINATIVE, IN THAT THE MAJORITY CONCEDES THAT AT BEST THE GOVERNMENT'S EVIDENCE BARELY PASSED EVEN THE REDUCED STANDARD EMPLOYED BY THE MAJORITY IN DECIDING THE CASE.

(a) In viewing the evidence, the majority fails to realize that Appellant's conviction on the counts of armed robbery and assault with a dangerous weapon was based, under D.C. Code § 22-105, on his being an accessory by allegedly driving the getaway car, so that proof that there was a person waiting in the car as the driver is part of the corpus delicti and must of itself be proved beyond a reasonable doubt. Dimmick v. United States, 135 Fed. 257, 263 (9th Cir. 1905). It was not even contended that this fact was proved "beyond a reasonable doubt, either by direct testimony or by presumptive evidence of the most cogent or irresistible kind." (Idem) This clearly shows that the majority misunderstood the nature of the offense charged.

(b) The majority stated that there was "evidence rationally indicating that there was a driver waiting in the car outside the Safeway that was robbed." The facts show that the getaway car was parked several blocks away from the Safeway, at the corner of 8th and Van Buren Street. It was not merely "outside the Safeway" nor did the robbers simply "cross the street" to get to the car. Moreover, the evidence presented did not indicate that there was a driver waiting in the car; it merely showed that such a possibility was rationally consistent with the facts presented. The observation relied on by the majority was that of the Assistant Manager of the Safeway, who testified that from a distance of

over a block away he saw the car start taking off before all the doors were shut. The majority ignored the fact that the Assistant Manager lost sight of the robbers during the chase and gave no testimony whether one of the robbers was ahead of the others. He did testify that he did not see anyone waiting in the car, explaining that he was too far away to make such an observation. As stated by Judge Robb in his dissenting opinion, it is physically impossible for all of the robbers to have entered the car simultaneously, so the fact that all the doors were not closed when the car began to move "rationally indicates" no single conclusion.

(c) The majority stated that Appellant was "casing" a grocery store in another part of town earlier in the afternoon when, in fact, no evidence of criminal intent was introduced, but only the bare fact that Appellant was driving slowly past the store front display window.

(d) The majority stated that the Assistant Manager of the Safeway Store viewed Appellant's car at the police station and said that it looked like the one used by the robbers when, in fact, as Judge Robb noted, no evidence was introduced that the witness was shown a car belonging to Appellant.

(e) The majority stated that the amount of money found in the possession of Appellant was "within a reasonable range of an aliquot share of the sum taken from the Safeway."

In fact, the amount in Appellant's possession was $295.00. An aliquot share, assuming that there was a driver of the getaway car, would be $371.04. For some unsupportable reason,the majority compares the amount on Appellant's person to one-seventh of the $2,226.22 stolen, and then incorrectly states that these amounts are approximately equal. One-seventh of the amount would be $318.03. On the record, there is absolutely no doubt that this comparison is irrelevant. cf. Hunt v. United States, 115 U.S. App. D.C. 1, 316 F.2d 652, 655 (1963).

For the reasons stated above, the Appellant, by his court appointed attorney, John C. Reid, asks that this petition be granted.

Respectfully submitted,

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Attorney for Petitioner
1700 Pennsylvania Avenue, N. W.
Washington, D. C. 20006

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing En Banc has been delivered to Appellee's attorney, Robert C.Crimmins, Esq., Assistant United States Attorney, Third and Constitution Avenue, N. W., Washington, D.C. 20001, this twenty-ninth day of June, 1970.

John C. Reid